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(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:

CWM Chemical Services, Inc.,)
Chemical Waste Management, Inc., and)
Waste Management, Inc.)

TSCA Appeal No. 93-1

Docket No. TSCA-PCB-91-0213

[Decided May 15, 1995]

ORDER ON INTERLOCUTORY APPEAL

***Before Environmental Appeals Judges Nancy B. Firestone and Ronald
L. McCallum.***

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**CWM CHEMICAL SERVICES, INC.,
CHEMICAL WASTE MANAGEMENT, INC., AND
WASTE MANAGEMENT, INC.**

TSCA Appeal No. 93-1

ORDER ON INTERLOCUTORY APPEAL

Decided May 15, 1995

Syllabus

Pursuant to an approval document issued by U.S. EPA Region II, CWM Chemical Services, Inc., Chemical Waste Management, Inc., and Waste Management, Inc. (collectively "CWM") operated a landfill for the disposal of PCB contaminated sludges containing PCB concentrations less than 500 ppm. Region II issued a complaint against CWM alleging in part that CWM violated the 500 ppm limitation in its landfill approval by disposing of 260 shipments of sludge containing concentrations of PCBs in excess of 500 ppm. The Region seeks \$3,425,000 in penalties for these alleged violations.

Before any pre-hearing exchange, CWM moved to dismiss this portion of the complaint based upon an affidavit from its employee that each of the 260 shipments contained PCBs in concentrations below 500 ppm measured on a dry weight basis. The Region opposed the dismissal, providing circumstantial evidence from the sludge generator that the sludges contained PCB concentrations greater than 500 ppm on a dry weight basis. CWM then filed a motion for an accelerated decision contending that during the time of the alleged violations it was not legally obligated to measure PCB concentrations on a dry weight basis.

On March 18, 1993, in a ruling from the bench, the presiding officer granted CWM's motions. The presiding officer concluded that for the time period in question, CWM was not legally obligated to measure PCB concentrations on a dry weight basis. Because the complaint rested in a faulty legal assumption (that dry weight measurements were required), the presiding officer dismissed the complaint, explaining that the Region neither alleged nor set forth in the complaint a violation based upon the wet weight method of measuring PCB concentrations.

The Region obtained certification for an interlocutory appeal, which was granted by the EAB. On appeal, the Region contends that at the time of the alleged violations, CWM was legally obligated to measure PCB concentrations on a dry weight basis because such an obligation can be found in CWM's landfill approval and the applicable regulations, and because CWM had notice, either constructive or actual, of this requirement.

Held: The presiding officer did not err in granting CWM's motions. The presiding officer correctly concluded that at the time of the alleged violations, there was no legally enforceable obligation upon CWM to measure PCB concentrations on a dry weight basis. Such an obligation has not appeared in the applicable regulations since 1984, and EPA documents acknowledge as much. The obligation is not set forth in CWM's landfill approval. Further, to the extent the Region may be claiming that CWM had notice of such a requirement through a rule (whether legislative or interpretative) there is no merit to that contention: no such rule has ever existed. Although an agency is permitted to develop an interpretation of validly promulgated rules for the first time in an adjudication, the application of the interpretation must comport with due process, particularly where the agency is seeking penalties for a violation of the interpretation. Due process mandates that before penalizing a party for violating a rule, the agency must provide adequate notice of the conduct required or prohibited by the rule. Here, the Region asks that the landfill approval and applicable regulations be interpreted as requiring dry weight measurements. Because both the landfill approval and the applicable regulations are completely silent as to how PCB concentrations should be measured, they do not provide notice that dry weight measurements are required, and therefore due process prohibits a finding that CWM violated a requirement to conduct dry weight measurement.

The presiding officer also properly dismissed the complaint. The presiding officer correctly interpreted the complaint as intending to allege violations only on a dry weight basis. Because CWM was under no legally enforceable obligation to measure compliance on a dry weight basis, the complaint did not state a claim upon which relief can be granted, and dismissal is warranted.

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*Before Environmental Appeals Judges Nancy B. Firestone and Ronald
L. McCallum.*¹

Opinion of the Board by Judge McCallum:

We are today sustaining the partial dismissal of an administrative action under the Toxic Substances Control Act, as amended ("TSCA"),² and related regulations,³ in which \$3,425,000 in civil penalties are at stake. The action was brought against three related entities, CWM Chemical Services, Inc., Chemical Waste Management, Inc., and Waste Management, Inc. (collectively "CWM"), by the Director of the Environmental Services Division, U.S. EPA Region II (hereafter the "Region"). The Region takes the position that CWM accepted certain industrial sludges contaminated with polychlorinated biphenyls ("PCBs") for disposal in its landfill even though the concentration of PCBs in the sludges was so high (above 500 ppm) that CWM's approval document for its landfill prohibited their disposal, and the PCB disposal regulations required them to be disposed of in an incinerator. Our reasons for sustaining the dismissal of the action, which are detailed below, touch upon matters of fundamental fairness in the way this Agency carries out its enforcement activities under EPA's different regulatory programs. Basically, we are holding the Agency to a standard of notice that requires the Agency to express the intent of its regulations with sufficient clarity that those who may be subject to penalties for violating the regulations will have fair warning of conduct prohibited or required by the regulations.

I. BACKGROUND

A. Regulatory Background

At the heart of the controversy in this appeal is the method by which PCB concentrations in PCB-contaminated sludges are measured: whether they are measured "as is," without any attempt to remove excess moisture, *i.e.*, the so-called "wet weight" method; or whether excess moisture is removed first, the so-called

¹ Environmental Appeals Judge Edward E. Reich did not participate in this decision.

² The sections of TSCA implicated are 6(e), 15, and 16(a), which may be found at 15 U.S.C. § 2605(e), 2614, and 2615(a).

³ The regulations implicated are 40 C.F.R. § 761.75 (Chemical waste landfills) and § 761.60(a)(1) (Disposal requirements).

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"dry weight" method. The presiding officer in his ruling from the bench explained these terms as follows:

Dry weight measurement shows the concentration of PCBs in the waste sample after the waste sample is dried in the laboratory. The as is or wet weight basis of measurement shows the PCB concentration in the waste sample before drying. Since the drying drives off moisture and other constituents, but leaves the PCBs intact, a higher concentration of PCBs will exist in that sample after drying than had existed in the waste before drying. Before drying the indicated concentration of PCBs in the waste would be less because they would exist in combination with moisture and other constituents in the waste.

Transcript of Judge's Rulings on Motion to Dismiss, Motions for Accelerated Decision and Motion to Supplement at 10 (March 18, 1993) (Lotis, J.) (hereafter "Bench Decision"). The presiding officer noted that the difference between the two methods is dramatic, as shown by tests conducted on sludge samples generated by General Motors, which is the same company that generated the sludges at issue here (but the samples themselves are not from the actual shipments received by CWM at its facility): a June 23, 1987 sludge sample contained a dry weight PCB concentration of 600 ppm and a wet weight PCB concentration of 21 ppm, and an August 25, 1987 sludge sample contained a dry weight PCB concentration of 780 ppm and a wet weight concentration of 31 ppm.⁴ Bench Decision at 11.

As originally proposed in 1977 and promulgated in 1978, the PCB disposal regulations included an express requirement to measure PCB concentrations on a dry weight basis.⁵ When more comprehensive regulations were adopted in 1979, the dry weight measurement requirement remained in the

⁴ As indicated, these test results do not pertain to the particular sludge shipments involved here. The Region acknowledges that it has never received from the generator of the sludges in question "any records that list the PCB concentration levels of the specific 260 loads in issue." Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss at 17.

⁵ The original PCB disposal regulation required the disposal of a PCB mixture by incineration. A PCB mixture was defined as "any mixture which contains 0.05 percent (on a dry weight basis) or greater of a PCB chemical substance." 43 Fed. Reg. 7157-7158 (Feb. 17, 1978).

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regulations.⁶ However, in 1984, the requirement to measure PCB concentrations on a dry weight basis was dropped from the regulations without a hint of explanation. *See* 49 Fed. Reg. 28,189 (July 10, 1984).

Five years later, in 1989, the Agency took the first preliminary steps to deal with the deletion of the dry weight regulatory requirement. As part of an "Expedited PCB-Rule Interpretation Process ("EPIP")," the Agency's office responsible for administering the toxic substances program, the Office of Toxic Substances ("OTS"), explored the Agency's options in addressing "whether the PCB concentration in contaminated sludges, soils, etc. should be determined on a wet weight or dry weight basis." Memorandum from Charles L. Elkins, Director, Office of Toxic Substances, to Addressees (Nov. 28, 1989) ("EPIP Memorandum"). One option rejected by OTS was to issue a policy statement explaining that sludges containing PCBs must be analyzed on a dry weight basis. OTS rejected this option because it would not improve the Agency's position to enforce the dry weight measurement requirement, and specifically, "could emphasize to the regulated community that the dry weight language is no longer in the regulations," and "damage * * * particular enforcement cases." EPIP Memorandum. Another option rejected by OTS was to maintain the status quo. Under the status quo, the dry weight measurement requirement would not be contained in the regulations or in a policy statement. This option was rejected because it would weaken the Agency's enforcement position, and would "continue[] vagueness for analytical requirements in PCB materials because of the absence of explicit 'on a dry weight basis' language in the regulations." EPIP Memorandum.

The last option considered by OTS was the one the Agency has ultimately chosen to pursue, and that was to "[a]mend the regulations to reinstate [the] parenthetical phrase 'on a dry weight basis' into the applicability section of the PCB rules." This option was selected because it would "restore Agency enforcement capability to require industrial sludges, soils, etc., to be disposed of based on their PCB concentration analyzed on a dry weight basis." Consequently, on April 5, 1990, the Agency proposed amending the PCB regulations to reinstate the dry

⁶ The requirement was moved from the definition of a PCB mixture to the regulation entitled "Applicability," which provided that for the purposes of the regulations pertaining to the manufacture, processing, distribution in commerce, use, disposal, storage and marking of PCBs and PCB items, the "terms PCB and PCBs are used in this rule to refer to any chemical substances and combinations of substances that contain 50 ppm (on a dry weight basis) or greater of PCBs." 44 Fed. Reg. 31,543 (May 31, 1979).

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weight requirement. *See* 55 Fed. Reg. 12,886 (Apr. 5, 1990). This proposal never resulted in a final rule and was ultimately abandoned in favor of a revised proposal, which was published in the *Federal Register* on December 6, 1994, as part of a broader rulemaking effort concerning other PCB disposal topics.⁷ The purpose of the reproposal, as it is called, is to "clarify the requirements for determining PCB concentrations in liquids, non-liquids, and multiphasic combinations of liquids and non-liquids * * *." 59 Fed. Reg. 62788 (Dec. 6, 1994). As explained in the *Federal Register* notice:

Proposed § 761.1(b) of this rule would require that PCB concentrations for non-liquid materials, which contain no liquids which pass through the filter when using the paint filter test method (EPA Method 9095 in "Test Methods for Evaluating Solid Waste" (SW-846)), be determined on a dry weight basis according to the definition proposed at § 761.3. The proposed rule would require the PCB concentration to be determined on a wet weight basis for liquid PCBs as defined at § 761.3, i.e., homogeneous flowable material containing PCBs and no more than 0.5 percent non-dissolved materials. This rule would also establish requirements for determining PCB concentrations in situations where separate, distinct phases were present within samples of materials containing PCBs.

59 Fed. Reg. at 62835. The Region and CWM disagree as to whether, among other things, the reproposal substantiates or undermines their respective positions.⁸ The reproposal is still outstanding as of this writing.

B. Factual and Procedural Background

⁷ 59 Fed. Reg. 62788 *et seq.* (Dec. 6, 1994).

⁸ For example, the Region asserts that the proposal classifies all sludges as non-liquid wastes, thus requiring PCB levels to be measured on a dry weight basis. Complainant's Memorandum in Opposition to Respondents' Supplemental Brief at 7 (March 7, 1995). CWM vigorously disputes the Region's characterization of the reproposal. Whether a sludge is subject to the dry weight requirement, according to CWM, depends upon whether it passes or fails the paint filter test. If a particular sludge passes the test, it is a non-liquid and subject to at least some dry weight testing; if it fails the test because it is too aqueous, then it is not a non-liquid subject to dry weight testing. Respondents' Reply to Complainant's Memorandum In Opposition to Respondents' Supplemental Brief at 6 (March 24, 1995). We note in this connection that the Agency in its 1985 policy document, *see infra* n.10, originally asserted that PCB sludges are liquids and thus may be properly disposed of in landfills.

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The complaint filed against CWM, dated March 9, 1991, consists of three counts. Each count alleges multiple violations involving 500 shipments of PCB-contaminated sludges received from the General Motors Central Foundry in Massena, New York, and disposed of at CWM's Model City, New York landfill. According to the complaint, these shipments occurred on numerous occasions from 1984 through 1987. The total amount of sludge throughout the period exceeded 19 million pounds. The complaint alleged that the PCB concentration of each shipment either exceeded 500 ppm or is deemed to exceed that amount where dilution has taken place.⁹ The complaint, however, did not specify whether the PCB concentration level of the shipments disposed of by CWM was calculated on a dry or wet weight basis. The complaint proposed a penalty of \$7,075,000.

The violations as alleged in the complaint are tied to an "approval" document that EPA had issued to CWM for the facility. The approval was issued pursuant to 40 C.F.R. § 761.75, and authorized CWM to operate a chemical waste disposal landfill for the disposal of PCBs in accordance with the terms of the approval and applicable regulations. The approval document provides that "No shipment of liquids or sludges determined to have a PCB concentration above 500 ppm shall be accepted for disposal."¹⁰ The complaint alleged that the shipments in question violated this provision of the approval, which in turn constituted a violation of section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C) (making it unlawful to fail to comply with certain rules and orders). The complaint further alleged that because the disposal of these shipments violated the terms of the approval document they also were not in compliance with 40 C.F.R. § 761.60(a)(1) (generally requiring incineration of PCBs having concentrations greater than 50

⁹ The original concentration prior to dilution is controlling for regulatory purposes. *See* 40 C.F.R. § 761.1(b) ("No provision specifying a PCB concentration may be avoided as a result of any dilution, unless otherwise specifically provided.").

¹⁰ The PCB disposal regulation, 40 C.F.R. § 761.60(a), generally requires incineration of all PCBs in concentrations greater than 50 ppm. The authority EPA relies on to issue an approval to dispose of industrial sludges containing more than 50 ppm but less than 500 ppm PCBs in a chemical waste landfill (rather than in an incinerator) is a policy document entitled, "TSCA Compliance Program Policy No. 6-PCB-4, Disposal Methods for PCBs in Sludge," issued by the Director of the Office of Compliance Monitoring, Office of Pesticides and Toxic Substances, U.S. EPA, dated August 13, 1985. According to this policy document, although none of the regulatory exceptions to the incineration requirement expressly apply to PCB-contaminated industrial sludges, it is the Agency's belief that the "intent of the regulations" is to allow such sludges to be treated like PCB liquids, which, under 40 C.F.R. § 761.60(a)(3), can be disposed of in an approved chemical waste landfill if the concentration of PCBs in the liquid is less than 500 ppm. For purposes of this decision, we assume that the policy document is a valid interpretative rule.

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ppm), which in turn also constituted a violation of section 15(1)(C) of TSCA.¹¹ In the case of the 1984 shipments only, the complaint also charged CWM with failing to test the shipments for PCB concentration levels in accordance with the approval prior to accepting them for disposal.

Notwithstanding the span of time covered in the complaint, the present appeal (like the decision of the presiding officer) only concerns shipments and alleged violations that occurred on or after March 9, 1986. This is the result of a partial stay of the proceedings below, granted on April 21, 1992, by the presiding officer, pending a ruling by the U.S. Court of Appeals for the District of Columbia Circuit on the applicability of the general five-year statute of limitations to administrative actions under TSCA.¹² As a result, all allegations in the complaint pertaining to violations occurring prior to March 9, 1986--*i.e.*, violations occurring more than five years prior to the filing of the complaint in this proceeding--have been stayed. The parties agree that the issues before the presiding officer relate solely to the 260 loads of sludge accepted for disposal between June 26, 1986 and October 20, 1987. The proposed penalty associated with these shipments is \$3,425,000.

Prior to any pre-hearing exchange, *see* 40 C.F.R. § 22.19(b), CWM moved to dismiss the portion of the complaint alleging that, without taking into account the possible effects of dilution, the actual PCB concentrations of the 260 shipments at issue exceeded 500 ppm when they were disposed of by CWM.¹³ As

¹¹ The regulation states that, except as provided elsewhere in the regulation, "PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator." Plainly, industrial sludges with PCB concentrations greater than 500 ppm would appear to require incineration under this rule, as the rule provides no express exception for such sludges. *See* Oral Argument Transcript at 14-15. However, as indicated in the previous footnote, the Agency has interpreted the regulation as allowing the disposal of industrial sludges containing PCB concentrations greater than 50 ppm but less than 500 ppm in a chemical waste landfill approved under 40 C.F.R. § 761.75. *See supra* n. 10. Despite this interpretation, we note that the Region also alleged in the complaint--perhaps out of an abundance of caution--that each of the shipments at issue contained PCBs in excess of 50 ppm and thus violated 40 C.F.R. § 761.60(a)(1).

¹² While this appeal was pending, the court determined that the general five-year statute of limitations contained in 28 U.S.C. § 2462 applies to administrative proceedings for the assessment of a penalty. *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

¹³ The complaint alleged that the 260 shipments violated the 500 ppm concentration limit because 1) their actual concentrations exceeded 500 ppm or 2) they were legally deemed to exceed the regulatory limit by virtue of the anti-dilution rule in 40 C.F.R. § 761.1. CWM's motion sought

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grounds for the dismissal, CWM asserted that the PCB content of each of the shipments was below 500 ppm. To support its motion, CWM furnished the affidavit of its landfill laboratory manager, Jill Knickerbocker, the individual responsible for "the sampling and analysis of waste materials delivered to the Model City facility for disposal." Knickerbocker Affidavit at 1. Knickerbocker stated that the actual dry weight PCB concentration of each of the 260 shipments at issue was less than 500 ppm when disposed of by CWM.¹⁴ By referring to dry weight concentrations, CWM did not concede that dry weight calculations were legally required; instead, CWM provided dry weight calculations to avoid any argument on this issue, which it maintained is unnecessary to address its motion to dismiss. Motion to Dismiss at 5 n.2. Lastly, Knickerbocker stated that she "reviewed the records General Motors has provided to EPA regarding the waste loads disposed of at Model City between June 26, 1986 and October 20, 1987, as well as the [General Motors] records that [CWM] * * * provided to EPA regarding such waste loads," and that these records show PCB concentrations below 500 ppm. Knickerbocker Affidavit at 2.

In its response to this motion, the Region argued that CWM is not entitled to a dismissal because a genuine issue exists as to a material fact, that is, "[w]hether each such load had an actual PCB dry weight concentration in excess of 500 ppm." Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss at 8. In support of this assertion, the Region supplied two affidavits by which it claimed that CWM's affidavit was insufficient to support a dismissal. The Region claimed, *inter alia*, that facts asserted in Knickerbocker's affidavit conflict with documents received from General Motors. According to the affidavit of David Greenlaw,¹⁵ the Region did receive documents from General Motors showing that

¹³(...continued)

dismissal only of the first allegation, not the allegation concerning the anti-dilution rule. Motion to Dismiss at 4. It said that granting the motion would allow the court to focus on what CWM believed was the "apparent gravamen of EPA's allegations [which CWM also reserved the right to challenge] -- that Respondents disposed of General Motors waste loads that, in EPA's view, contained PCB concentration[s] *diluted* below 500 ppm." *Id.* at 6 (emphasis added).

¹⁴ Specifically, the dry weight PCB concentrations of the 260 shipments ranged "from non-detectable to 378, with an average actual PCB concentration of 45 ppm." Knickerbocker Affidavit at 2.

¹⁵ David Greenlaw is a chemical engineer in the Pesticides and Toxic Substances Branch of Region II. His duties and responsibilities have included conducting PCB inspections, developing administrative complaints, participating in settlement negotiations, and reviewing proposed PCB

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sludges generated during the time period in question, and more specifically, when all of General Motors' sludges were disposed of at CWM's facility, contained dry weight PCB concentrations in excess of 500 ppm. These measurements were based on sludge samples drawn from a tank at the General Motors facility rather than directly from any of the 260 shipments received by CWM. Greenlaw also asserted that other documents the Region received from General Motors show that sludges generated by General Motors during that time period, but not necessarily shipped to CWM for disposal, contained dry weight PCB concentrations in excess of 500 ppm. Greenlaw Affidavit at 12-17, *citing* Exhibits 6, 7 and 9 ("Greenlaw Exhibits"). The Greenlaw Exhibits, however, indicate that the sludges contained wet weight PCB concentrations far below the 500 ppm limitation.¹⁶

Almost immediately after the Region responded to CWM's motion to dismiss, and while that motion was pending, CWM filed a motion for an accelerated decision on the legal question of whether the Region can rely upon dry weight PCB concentrations to assess penalties. This motion further asked the presiding officer to conclude that because CWM was under no legally enforceable obligation to measure PCB concentrations on a dry weight basis, the Region could not use the Greenlaw Exhibits showing dry weight violations of the 500 ppm limitation to establish the alleged violations.¹⁷

The presiding officer ruled on, and granted, CWM's motions in a bench decision issued on March 18, 1993. *See* Bench Decision. First, he concluded as a matter of law that there was no legal requirement in place for the period in question that would have obligated CWM to measure PCB concentrations on a dry weight basis. In reaching this conclusion, the presiding officer considered the following. Under the principles of due process, no violation can occur unless the Agency gives fair and clear warning of the conduct required. Here, at the time in

¹⁵(...continued)
regulations and policies.

¹⁶ Thus, although the Greenlaw Exhibits arguably support the inference that at least some of the 260 shipments at issue violated the 500 ppm limitation when measured on a dry weight basis, they do nothing to refute CWM's subsequent contention, discussed *infra*, that the shipments did not exceed the 500 ppm limitation when measured on an "as is" or "wet weight" basis.

¹⁷ The Region responded to this motion in part by claiming that it had a longstanding enforceable policy requiring dry weight measurement of PCB concentrations. This led CWM to file a second motion for an accelerated decision, urging the presiding officer to conclude that under the Administrative Procedure Act, any such policy is not accorded the legal effect of a duly promulgated rule.

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question, that is, June 26, 1986 through October 20, 1987, the applicable regulations did not contain a requirement to determine PCB concentrations on a dry weight basis, and furthermore, had not contained any such requirement since 1984. He noted that the Agency's inability to enforce this requirement absent a regulation mandating dry weight measurement was acknowledged in the EPIP Memorandum. Further, the EPIP Memorandum demonstrated that to the extent EPA had a policy of requiring dry weight testing, such a policy was never formalized, but was based on unwritten, unpublished and individual opinions and beliefs. The presiding officer rejected the Region's claim that CWM was equitably estopped from denying the validity of such a requirement, ruling that a legally enforceable requirement cannot be established by the actions or conduct of the regulated community. Nor could such a requirement be established by the scientific community's acceptance that the dry weight method best suits the regulatory goals of the PCB disposal regulations. The presiding officer also concluded that contrary to the Region's assertions, the approval for CWM's landfill did not specify the use of the dry weight method for determining PCB concentrations.

Finding no legal basis to enforce the dry weight measurement requirement here, the presiding officer then ruled that because the complaint rested on the faulty underlying assumption that CWM was under a legal obligation to measure the PCB concentrations of the shipments on a dry weight basis the complaint should be dismissed. Bench Decision at 32. Because the Region did not intend to allege or assert any violations of the 500 ppm concentration level based on a wet weight measurement, the presiding officer concluded that the complaint failed to allege a prima facie case of a violation, and therefore he granted the motion to dismiss. Bench Decision at 36.

Pursuant to 40 C.F.R. § 22.29, the Region sought and obtained the presiding officer's certification of his order for an interlocutory appeal. The Board accepted the certification on the ground that the case presented an important question of law or policy that has important implications for the Agency, and held oral argument on June 23, 1993. Subsequent to the oral argument, CWM filed a motion on January 23, 1995, asserting that the December 6, 1994 reproposal of the April 5, 1990 proposed rule represented further evidence that there was never any valid basis for imposing a dry weight requirement in the absence of an explicit provision to that effect in the regulations. The Region responded, opposing CWM's motion and the arguments on which it was based. We uphold the presiding officer's

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granting of CWM's motions. As a matter of law, there is no dry weight requirement applicable to the shipments at issue.¹⁸

II. ANALYSIS

There is no dispute between the parties that under the landfill approval CWM can dispose of only those sludges containing a maximum PCB concentration of 500 ppm. The dispute in this matter concerns how compliance with that limitation shall be measured. In that regard, everyone agrees either explicitly or implicitly that the inclusion of a dry weight requirement in previous versions of the PCB disposal regulations and the subsequent removal of that requirement from the current regulations are relevant considerations in resolving the dispute. Thus, on that basis the presiding officer proceeded with his ruling on the pending motions and concluded that compliance with the approval document should be determined on an "as is" or wet weight basis, because at the time of the alleged violations there was no legally enforceable requirement for CWM to measure PCB concentrations on a dry weight basis.

On appeal, the Region contends that compliance can only be determined by measuring PCB concentrations on a dry weight basis, and that this requirement can be enforced against CWM. Specifically, the Region contends that CWM "had constructive notice that dry weight basis measurements were fundamental to the PCB regulatory scheme and therefore they were required by that scheme." Oral Argument Transcript at 6. More specifically, the Region contends that "in light of the existing and available scientific information as to the merits of dry weight versus wet weight determinations of PCB concentrations in sludges," CWM, as "sophisticated corporate operators of a state-of-the-art PCB disposal facility," should have known that they were required to determine the PCB concentration of the sludges on a dry weight basis. Complainant's Memorandum in Opposition to Respondent's Motion for Accelerated Decision at 26, 28. Citing CWM's submission of data on a dry weight basis, the Region argues that CWM indeed had notice of the dry weight measurement requirement, Oral Arg. Tr. at 25-26, and is therefore estopped from obtaining relief. *Id.* at 6.

¹⁸ We also grant CWM's motion to file a supplemental brief on the reproposal. CWM's motion to file the supplemental brief was accompanied by the brief, and the Region responded at length to the merits of the brief on March 7, 1995.

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We conclude that the presiding officer did not err in granting CWM's motions for an accelerated decision and to dismiss based on his assessment that CWM was not under any legal requirement to determine PCB concentrations on a dry weight basis (the ruling on the motion for accelerated decision) and that the Region did not allege any violations by CWM on an "as is" basis (the ruling on the motion to dismiss). We agree with the presiding officer's reasoning and provide our specific reasons in more detail as follows.

Motion for Accelerated Decision. Rule 22.20(a) of the Consolidated Rules of Practice (40 C.F.R. Part 22) provides that a presiding officer:

[M]ay at any time render an accelerated decision in favor of the complainant or respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to all or any part of the proceeding.

Rule 22.20(a) is comparable to the summary judgment process allowed under Rule 56(c) of the Federal Rules of Civil Procedure. *In re ICC Industries, Inc.*, TSCA Appeal No. 91-4, at 13 (CJO, Dec. 2, 1991); *In re BKK Corp.*, RCRA (3008) Appeal No. 84-5, at 12 (CJO, May 10, 1985), *vacated on other grounds* (Oct. 23, 1985); *see also In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23 (EAB, Aug. 23, 1993), *aff'd Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994) (permissible for agencies to look to Rule 56 case law for guidance in respect to administrative summary judgments). The question of whether CWM was legally required to determine the concentration of the PCB-contaminated sludges it accepted for disposal, or disposed of, on a dry weight basis requires us to interpret the applicable regulations and landfill approval document, and therefore is a question of law appropriate for resolution by an accelerated decision. *See Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174 (5th Cir. 1991) (summary judgment appropriate where only issue is question of pure law); *cf. Mason v. Montgomery Data, Inc.* 741 F. Supp. 1282 (S.D. Tex. 1990) (statutory interpretation is a question of law). Further, the specific due process question raised by CWM, that is, whether the regulations provided notice of the required conduct, is also a question of law appropriate for disposition by accelerated decision. *See Agustin v. Quern*, 611 F.2d 206, 209 (7th Cir. 1979) ("plaintiff's argument is really whether his being unaware of the appropriate standards of

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conduct rendered his termination [as a medicaid vendor] constitutionally infirm, and that is a question of law, not fact").

The requirement to measure PCB concentrations on a dry weight basis is not contained in the disposal regulations. It is undisputed that the PCB disposal regulation cited in the complaint, 40 C.F.R. § 761.60(a)(1), does not expressly require dry weight measurement of PCB concentrations. It simply provides, with certain exceptions, that "PCBs at concentrations" above the regulatory threshold "must be disposed of in an [approved] incinerator * * *." The term PCBs is understood to include, *inter alia*, the chemicals themselves, the equipment they are in, and PCB wastes, all without any suggestion that the concentration of the PCB content must be measured on a dry weight in contrast to an "as is" basis. *See generally* 40 C.F.R. § 761.3 (definitions). The same is true for 40 C.F.R. § 761.1, pertaining to the applicability of the PCB disposal regulations. The regulation merely notes that the disposal regulations apply to PCB "materials" that exceed the threshold concentration. The only specific indication of a circumstance in which the moisture content of the PCBs is an express consideration is when the PCB materials have been subject to dilution. But even then the relevant concern is to ascertain the original concentration of the materials prior to dilution. *See* 40 C.F.R. § 761.1(b).¹⁹ Whether the original concentration is determined on a dry or wet weight basis is a separate concern. Indeed, the Region agrees that the dry weight measurement requirement was deleted from the regulations in 1984. Once removed from the regulations, regardless of the reason for such removal,²⁰ the Agency no longer had any clear authority for requiring PCB concentrations to be measured on a dry weight basis. The Agency acknowledged as much in the EPIP Memorandum, which concluded that amending the regulations to restore the dry weight measurement requirement would be the best approach for reestablishing clear authority over the measurement of PCBs in sludges and other materials on a dry weight basis.

¹⁹ *See supra* n.9.

²⁰ According to the Agency, the deletion of the dry weight measurement requirement from the regulations was inadvertent. *See* 55 Fed. Reg. 12,866 (Apr. 6, 1990) ("this deletion was a drafting error"). This characterization, however, is unavailing, as it took the Agency approximately six years before it took the first formal steps to correct this "inadvertent" error by proposing to reinstate the dry weight requirement into the regulations. As the presiding officer aptly stated, "once the dry weight language was eliminated from the regulations in 1984 and no attempt was made to restore it to the regulations for six years it becomes academic whether the omission was an intentional one or a result of inadvertence." Bench Decision at 18.

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Nor can the authority be found in CWM's landfill approval document. This approval, dated January 30, 1985, does not itself require dry weight measurement of PCB concentrations.²¹ The document does state that "[t]he procedures described in SW-846, 2nd Edition shall be used for the analysis of PCB's," and in particular, methods 3540 and 8080 of SW-846. Letter from Paul Letki, Environmental Manager, SCA Chemical Services, Inc. to Ernest A. Regna, Chief, Solid Waste Branch, Region II at Attachment p.1, Appendix I p.4 (July 17, 1984). These particular methods do not require dry weight measurement. Method 3540 details the procedures for extracting compounds from solids, such as sludges, in preparation for chromatographic procedures. It provides that "[i]n certain cases, sample results are desired based on a dry-weight basis. When such data is desired," certain procedures should be followed. This language does not itself mandate dry weight measurement of PCB concentrations, but instead suggests that there may be a choice as to whether dry weight or wet weight measurement is required in any given case. As for Method 8080, it "is used to determine the concentration of * * * [PCBs]," and "provides gas chromatographic conditions for the detection of ppb levels of * * * PCBs." It does not expressly require dry weight measurement.

The Region does not dispute these descriptions of the methods contained in SW-846. Instead, the Region attempts to discredit the use of SW-846 in these proceedings by explaining that it was created to implement the Resource Conservation and Recovery Act, not TSCA. *See* Oral Arg. Tr. at 21-22. This argument, however, ignores the fact that the landfill approval granted by the Region to implement TSCA expressly requires the use of SW-846. Accordingly, we find merit in CWM's assertion that the landfill approval, by its own terms, *i.e.*, by specifically referring to the procedures in SW-846, which include Methods 3540 and 8080, does not mandate dry weight measurement to determine compliance with the 500 ppm PCB concentration limit.

The Region does not seriously challenge this interpretation of the landfill approval document. Instead, the Region argues on appeal that CWM had notice of the requirement to conduct dry weight testing. According to the Region, this notice was either actual, as evidenced by CWM's regular submission of dry weight concentrations in the reports required under its landfill approval (which the Region

²¹ In contrast to the 1985 approval, the approval granted to CWM in 1990 for the operation of an additional segment of the landfill specifically provides that "PCB concentrations shall be determined on a dry weight basis." Letter from Constantine Sidamon-Eristoff, Regional Administrator, to John J. Stanulonis, General Manager, CWM Chemical Services Inc. at Appendix I p.11 (Nov. 2, 1990).

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contends estops CWM from arguing that dry weight is not required), or constructive, in light of the scientific community's approval of the dry weight method.

We agree with the presiding officer that the Region's notice and estoppel arguments are "without legal foundation and contrary to basic principles and concepts underlying the Administrative Procedure Act." Bench Decision at 20. Under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, an administrative agency has two basic means of legally prescribing (or proscribing) specific conduct: either through rulemaking or through adjudication. *Pacific Gas and Electric Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). In the case of rulemaking, the regulated entity generally must have prior notice of the rule for it to be binding on that entity. As provided in the Administrative Procedure Act:

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

5 U.S.C. § 552(a)(1). Most rules are required to be published in the *Federal Register*, and the public must be given the opportunity to comment on them prior to their adoption in final form. 5 U.S.C. § 553(b). This publication requirement is for so-called substantive or legislative rules. An exception to the notice and comment requirement applies in the case of interpretative rules,²² general statements of policy, or rules of agency organization, procedure, or practice. *Id.* As a practical matter, however, we need not concern ourselves with the rulemaking requirements and exceptions thereto, for we note that the Agency had never promulgated a rule on the subject during the period in question. *See American Paper Institute Inc. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989) ("Promulgation means issuing a document with legal effect."). In other words, there was no

²² An interpretative rule is defined as a rule "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Attorney General's Manual on the Administrative Procedure Act* at 30, n.3 (1947); *Shalala v. Guernsey Memorial Hospital*, 63 U.S.L.W. 4205, 4208 (Mar. 6, 1995) (quoting the Attorney General's Manual); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, n.31 (1979) (same). There is no suggestion in this case, however, that the Agency ever issued an interpretative rule requiring dry weight measurements during the relevant time period. In fact, as noted previously, the Agency expressly rejected the option of issuing a "policy announcement" explaining that sludges containing PCBs must be analyzed on a dry weight basis. EPIP Memorandum; Oral Arg. Tr. at 18.

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Agency-wide, written embodiment of a dry weight requirement, or of the scientific approval of the requirement, of which CWM could have had notice. The Region concedes this fact on appeal, acknowledging that there was no publicly-noticed Agency policy requiring dry weight measurement of PCB concentrations. Oral Arg. Tr. at 18. ²³ At best, the Agency can point only to the opinions and beliefs of individuals within the Agency that the dry weight method is essential to the PCB regulatory program. Therefore, to the extent the Region may be contending that CWM had notice of an Agency rule requiring measurement of PCB concentrations on a dry weight basis, the contention is plainly without merit: one cannot have "notice" of a non-existent rule. Thus, the Region may not rely on the rulemaking prong of the Administrative Procedure Act as a basis for insisting that CWM was subject to a dry weight measurement requirement.

Turning to adjudication, the fact that there is no explicit requirement to conduct dry weight measurement of PCB concentrations in the regulations or landfill approval does not necessarily mean that the Region cannot use dry weight measurements to establish violations of the disposal regulation. An agency is permitted to interpret its validly promulgated rules, and courts will uphold the interpretation, even defer to it, provided the interpretation is "reasonable" and "supported by the regulation's text and the overall structure of the regulations." *Shalala v. Guernsey Memorial Hospital*, 63 U.S.L.W. 4205, 4207 (Mar. 6, 1995). Moreover, there is nothing to prevent an Agency from developing an interpretation of regulatory language for the first time in an enforcement adjudication, *see Beazer East Inc. v. EPA*, 963 F.2d 603 (3rd Cir. 1992), ²⁴ which is precisely the posture of the case currently before us. Here, the complaint charges CWM with violating the landfill approval and 40 C.F.R. § 761.60(a)(1), based not upon an express requirement in the approval or regulations or upon any previously promulgated rule, but upon the Region's contemporaneous interpretation of the regulation. ²⁵ The

²³ See also EPIP Memorandum (proposing, as alternative to status quo, adopting a policy statement requiring dry weight measurement).

²⁴ After oral argument before the Board, the parties were ordered to file briefs on the applicability of *Beazer East Inc. v. EPA*. The parties complied and also filed motions seeking leave to file supplemental briefs on the issue. These motions, which were accompanied by the supplemental briefs, are hereby granted.

²⁵ We view the issue presented by this appeal as principally one of construing a regulation, specifically, 40 C.F.R. § 761.60(a)(1). As explained earlier, the violations in the complaint are tied to the approval document, which provides that "No shipment of liquids or sludges determined to have a PCB concentration above 500 ppm shall be accepted for disposal." Thus, at one level we are only
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Region asserts that, based on the entire PCB regulatory scheme, it is proper to construe the regulation and approval as requiring PCB concentrations in sludges to be measured on a dry weight basis. The Region claims that reporting PCB concentrations on a dry weight basis is so vital to the PCB regulatory scheme that dry weight measurement must be considered an integral component of the regulation. As explained below, we disagree.

Foremost among our concerns is that this is an enforcement action and the Region is seeking to impose a penalty on CWM as a direct consequence of its interpretation; therefore, it is necessary to examine not only the reasonableness of the Region's interpretation but also whether its application complies with fundamental notions of due process. In other words, it is not enough that the interpretation of the regulation be reasonable, the regulation itself must provide the regulated community with adequate notice of conduct required by the agency. *See Southwestern Bell Telephone Co. v. FCC*, 10 F.3d 892, 896 (D.C. Cir. 1993) ("Although the Agency's interpretation of its own orders is ordinarily entitled to deference, we pay strict heed to whether the Agency provided affected parties with full notice of the *content* of those interpretations.") (emphasis supplied). Thus, even though an agency may develop an interpretation of regulatory language for the first time in an adjudication, the application of that interpretation must also comply with the demands of due process. "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).²⁶ "[T]he application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited." *Phelps Dodge Corp. v. Fed. Mine Safety and Health Rev. Comm'n*, 681 F.2d 1189, 1192 (9th Cir. 1982). Thus, although courts typically give

²⁵(...continued)

being asked to construe an approval document, not a regulation. That is, does the approval document require PCB concentration levels to be calculated on a dry weight or "as is" basis? While that question is certainly at issue in this proceeding, it is clear from a reading of the entire record as well as the complaint that the more important, or broader, question of whether the regulation imposes such a dry-weight requirement is also at issue.

²⁶ *Cf. Rollins Environmental Services (NJ) Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991). Rollins did not invoke the due process clause to avoid liability for violating a PCB regulation. Instead, Rollins challenged only the penalty assessment, and the court, using due process principles, concluded that "the lack of adequate notice resulting from the regulation's inherent uncertainty in meaning is a mitigating factor that had to be taken into account in assessing the civil penalty." *Id.* at 654.

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deference to an agency's interpretation of its own regulations, "[w]here the imposition of penal sanctions is at issue, however, the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co., Inc. v. OSHA Rev. Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.) (Commission's interpretation held impermissible where sanctions are involved).

Here, we conclude that the PCB disposal regulation allegedly violated did not give fair warning that dry weight concentrations are required; therefore, due process principles preclude a finding that CWM violated the disposal regulation. Consequently, whether the interpretation advanced by the Region is reasonable in a non-penal context is not a matter we have to address.²⁷ *Gates & Fox Co., Inc.*, 790 F.2d at 156 (court declined to express an opinion on whether the Commission's interpretation might be permissible "in a non-penal context"). The lack of fair warning in this instance derives from the simple fact that the disposal regulation and CWM's approval document are completely silent as to how PCB concentrations should be measured; they offer no clue that concentrations are to be measured on other than an "as is" or wet weight basis. "If the violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Diamond Roofing Co., Inc. v. OSHA Rev. Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976). "The test is not what [the agency] might possibly have intended, but what [it] said. If the language is faulty, the [agency] has the means and the obligation to amend." *Bethlehem Steel Corp. v. OSHA Rev. Comm'n*, 573 F.2d 157, 161 (3rd Cir. 1978). Although the Constitution does not require impossible standards, *Brennan v. OSHA Rev. Comm'n*, 505 F.2d 869, 872 (10th Cir. 1974), a court is not "at liberty to allow the agency to imply language that does not exist in the regulation." *Beazer East Inc.*, 963 F.2d at 607; see *Director, OWCP v. Barnes and Tucker Co.*, 969 F.2d 1524, 1527 (3rd Cir. 1992) (court will not "give deference to an interpretation of a regulation that implies language that does not exist in the regulation"); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324 (3rd Cir. 1987) (rule of deference "does not permit the policymaker, in an adjudicatory proceeding, to imply language that simply does not exist"). Upholding the Region's interpretation here would require us to imply language that does not exist in the regulation and the approval document, contrary to the due process principles detailed above.

²⁷ For example, we do not address the validity of the Region's inserting a dry weight requirement in CWM's landfill approval document in 1990.

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To satisfy due process, the notice of the required conduct must come from the language of the regulation itself or, if applicable, the approval document. In each of the above cases, the courts addressed the due process arguments by examining the language of the regulations at issue and the agency's interpretation of that language. None of these cases suggests that notice may come from other sources, such as the state of scientific knowledge.²⁸ This is not to say that the requisite notice cannot be supplied by the context of a regulatory command. In this case, however, the Region has not persuaded us that the scientific basis for using the dry weight method of measurement is a necessary part of the regulation's context. Among other things, the Region has made no attempt to link its opinion that the regulation requires dry weight measurement of PCB concentrations to the specific language in the disposal regulation allegedly violated. At most, the Region has shown that there are advantages to using the dry weight basis for measuring PCB concentrations in sludges. But the mere existence of such advantages does not lead *a fortiori* to the further conclusion that they are part of the regulatory context, much less that they might also outweigh competing considerations, such as the regulatory simplicity of "as is" measurements. The weighing of relative advantages is, of course, a legitimate function for the Agency to perform, but it is one that is typically and more appropriately carried out in a rulemaking context. Certainly, in our opinion, that should be the case in resolving the dry weight versus wet weight controversy. Accordingly, for the reasons stated above, we conclude that the language of the regulation does not provide fair notice of a dry weight requirement, at least not where the possibility of penalties are involved. *See Gates & Fox Co., Inc.*, 790 F.2d at 156 ("While we express no opinion on whether, in a non-penal context, the [agency's] interpretation of [the regulation] might be permissible, we hold that Gates & Fox did not receive constitutionally adequate notice that it could be sanctioned for" violating the regulation.).

The Region suggests that an adverse ruling on this issue will severely restrict its ability to enforce the PCB disposal regulation because there will be no standard of measurement for determining PCB concentrations, and this outcome violates common sense and the goal of protecting human health and the environ-

²⁸ If notice came from an interpretative rule or policy statement promulgated in accordance with the APA, we assume that would be sufficient for due process purposes. In that event, the analysis would next proceed to a determination of whether the Region's interpretation embodied in the rule or statement was reasonable in light of the language of the regulation and the overall structure of the regulatory scheme. *See Shalala v. Guernsey Memorial Hospital*, 63 U.S.L.W. at 4207. For purposes of this decision, we do not find it necessary to reach that latter question.

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ment. This position is without merit. There is still a standard of measurement--it is the PCB content of the substance in the "as is" state. The Region's distrust of this standard no doubt lies in the difficulty of determining the "as is" state and whether or not the waste has been subject to dilution. The lack of a dry weight standard for measuring PCB concentrations for enforcement purposes, however, does not stem from an adverse ruling by the presiding officer or the Board; "it is the regulation as written that must bear the blame." *Diamond Roofing Co.*, 528 F.2d at 650. Further, any enforcement problems in the future can be rectified by adopting the proposed rule reinstating the dry weight measurement requirement, or, perhaps, as the Region did here, by explicitly incorporating it in landfill approvals.²⁹

Insofar as amended regulations are concerned, we have not made any definitive determinations respecting the December 6, 1994 reproposal discussed earlier. Nonetheless, it is our impression that the reproposal is more supportive of CWM's position than of the Region's. By drawing distinctions between liquid and non-liquid PCB materials, as well as multiphasic combinations of the two, and then prescribing the varying circumstances for employing either dry or wet weight measurements, the reproposal appears to confirm the view that the issue of which method to use with respect to the type of sludge at issue here is hardly glaringly evident from the existing regulations. This impression is made even stronger by comparing the reproposal with the simplicity of the regulations that preceded the existing regulations; those earlier regulations specified a single uniform dry weight measurement requirement for all PCB materials.

Thus, in sum, we conclude that CWM was under no legally enforceable obligation to determine the PCB concentrations of its sludges on a dry weight basis and, therefore, cannot be held liable for accepting and/or disposing of sludges with PCB concentrations measuring in excess of 500 ppm on a dry weight basis. Under the Administrative Procedure Act such an enforceable obligation could only be created through a rulemaking or an adjudication. In the latter instance, where penalties are being sought, the principles of due process require that the language of the regulation itself or the express terms of the Agency's landfill approval provide fair notice to the regulated entity of the conduct required or prohibited by the Agency. Here, the enforceable obligation was not created through a rulemaking and, because we conclude that neither the Agency's regulations nor CWM's approval provide fair notice of the required conduct, such an obligation may not

²⁹ Oral Arg. Tr. at 7-10; *see supra* n. 21; *but see also* n. 27.

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otherwise be created in this adjudication. In addition, the omission of a dry weight requirement from the regulation cannot be supplied or corrected by holding a hearing, as the Region has requested, for the purpose of showing that "in light of the existing and available scientific information as to the merits of dry weight versus wet weight determinations of PCB concentrations in sludges," CWM, as "sophisticated corporate operators of a state-of-the-art PCB disposal facility," should have known that they were required to determine the PCB concentration of the sludges on a dry weight basis. The presiding officer correctly concluded that the dry weight requirement is a question of law, which in this instance cannot be decided by reference to evidence extrinsic to the language of the regulation. Accordingly, the legality of CWM's acceptance of sludges for landfill disposal during the relevant time period is determined by measuring the PCB concentration of the sludges on an "as is," *i.e.*, wet weight, basis, provided of course that no dilution has taken place.³⁰

Motion to Dismiss. The motion to dismiss sought the dismissal of the charges in the complaint to the extent that they alleged that the actual PCB concentrations of the 260 shipments exceeded 500 ppm. The presiding officer granted the motion, reasoning that this portion of the complaint was premised on the invalid assumption that dry weight measurement of PCB concentrations is legally required. According to the presiding officer, because dry weight measurement was not legally required for these shipments, CWM could comply with the 500 ppm limitation on a wet weight basis. The Greenlaw Exhibits produced by the Region in response to the motion to dismiss, however, show that sludges created during the relevant time period and shipped to CWM for disposal complied with the 500 ppm limitation on a wet weight basis. Under these circumstances, the presiding officer concluded, the Region "has not made the *assertion* let alone a *prima facie* case in the complaint that the respondent has disposed of PCBs measured on an as is [wet weight] basis in a concentration greater than 500 parts per million." Bench Decision at 36 (emphasis added). Therefore, the presiding officer granted CWM's motion to dismiss.³¹ On appeal, the Region contends that the presiding officer erroneously

³⁰ See *supra* n.13.

³¹ Actually, the presiding officer did not dismiss the complaint on the grounds advanced by CWM. As explained in the immediately following text, his dismissal of the complaint was based on a deficiency in the complaint (failure to state a claim upon which relief can be granted) whereas CWM's motion sought dismissal on the grounds that the evidence would show that no violations had occurred as alleged in the complaint--that is, the 260 shipments disposed of did not contain PCBs in excess of 500

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granted the dismissal, and that this case should be allowed to proceed to a hearing on the alleged violations.

We agree with the presiding officer that dismissal of the charges in the complaint was appropriate. The presiding officer ruled, in effect, that the complaint did not state a claim upon which relief can be granted since it did not allege any violations on a wet weight basis. For a complaint to state a valid claim for relief for violating the 500 ppm limitation in the landfill approval document, it would have to allege violations of that limitation on a wet weight basis. This follows from the presiding officer's ruling on the dry weight/wet weight issue on CWM's motion for an accelerated decision. Here it is clear that the complaint did not make the requisite allegations. While we note that the complaint itself does not specifically mention either the dry weight or wet weight method, and therefore by its terms does not seem to preclude reliance on either method, it is nevertheless apparent that the Region, in drafting the complaint, intended it to be construed as alleging violations based on the dry weight method. For example, in response to CWM's motion to dismiss the Region described the "dispositive issue" as "whether each such load had an actual PCB dry weight concentration in excess of 500 ppm." Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss at 8. Moreover, it is apparent that the Region's affidavits do not purport to make out a case against CWM on a wet weight basis, for the information shows wet weight concentrations well below 500 ppm. *See* Bench Decision at 33-36 (referring to the Greenlaw Exhibits). Accordingly, since the allegations in the complaint were drafted with the intent of alleging violations on a dry weight basis only, they failed to state a valid claim for penalizing CWM for exceeding the 500 ppm limitation in its landfill approval document.³²

III. *CONCLUSION*

³¹(...continued)

ppm on a dry weight basis. Because we conclude that a dismissal is justified here based upon the cited deficiency in the complaint, *see* 40 C.F.R. § 22.20(a) (dismissal warranted on grounds showing no right to relief on the part of the complainant), there is no need to examine CWM's factual contentions and the sufficiency of the Region's response thereto.

³² The Region also contends that this case should not be summarily decided at this preliminary stage of the proceedings without the benefit of any pre-hearing exchange. No purpose to such an exchange would be served, however, in light of the fact that the charges in the complaint fail to state a valid claim for relief.

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For the reasons set forth above, we hereby affirm the presiding officer's order, dated March 18, 1993, granting CWM's motions for accelerated decision and dismissal. Accordingly, this matter is remanded to the presiding officer for further proceedings consistent with this decision.

So ordered.